Office-Supreme Court, U.S.
FILED
OCT 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-574

In the

Supreme Court of the United States

October Term, 1984

PAUL VARIO,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL WINOGRAD
Attorney for Petitioner
950 Third Avenue
New York, New York 10222
(212) 688-1726

Julia Pamela Heit
Of Counsel

PRINTINGHOUSE PRESS—(212) 719-3120

3700

TABLE OF CONTENTS

	Page
Question Presented	i
Opinion Below	2
Jurisdiction	2
Statement of the Case	3
Reasons for Granting the Writ	21
Conclusion	30
Appendix A - Opinion	31

TABLE OF CASES

United States v. Birney, 686 F.2d 102 (2d Cir. 1982)	22, 26
United States v. Robinson, 560 F.2d 507 (2d Cir. 1977)	22, 26

STATUTES CITED

Title 18 U.S.C. §371	2
Title 18 U.S.C. § 1001	2, 4
Title 18 U.S.C. §2	2
Fed.R. Evid. 403	21,23, 25, 28 29
Fed. R. Evid. 404(b)	21,26

QUESTION PRESENTED

Whether the Second Circuit's use of the standard of arbitrariness and irrationality in reviewing whether the trial court's admission into evidence of prior criminal acts pursuant to Federal Rules of Evidence 403 was prejudicial to the defendant is at direct odds with the due process demands of the Fifth Amendment of the Federal Constitution and the Federal Rules of Evidence 403.

In the
SUPREME COURT OF THE UNITED STATES
October Term 1984

No.

PAUL VARIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The petitioner, Paul Vario, respectfuly prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on August 16, 1984, affirming a judgment of the United

States District Court for the Eastern District of New York, rendered on April 2, 1984, convicting him of conspiring to make false statements and defrauding the United States by making false and providing false, fictitious and fraudulent representations to various agencies of the government charged with administering the prison and parole laws, all in violation of Title 18 U.S.C. § 371 and with one substantive violation of Title 18 U.S.C. §1001 and 2.

OPINION BELOW

The opinion of the Court of Appeals, which is not reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 16, 1984 and is set forth in the Appendix hereto.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

No extension of time within which to file the instant petition has been sought.

STATEMENT OF THE CASE

On February 7, 1984, petitioner proceeded to trial before the Honorable Joseph M. McLaughlin on an indictment charging him with conspiring with Philip Basile and Henry Hill in making false and fraudulent statements to the Federal Bureau of Prisons and the United States Parole Commission in order to effectuate Hill's parole from

his place of incarceration at Allenwood, Pennsylvania. Petitioner and Basile were also charged with violating Title 18 U.S.C. §1001 in that they caused false and fraudulent statements to be made to the Federal Bureau of Prisons and the United States Parole Commission; namely, that Henry Hill was employed at a business owned and operated by Basile whereas in truth, as Basile, Hill and petitioner knew, Hill was not in fact employed by Basile.

The Government's case against petitioner was premised entirely on the testimony of Henry Hill, an admitted long term career criminal, who claimed that he, along with petitioner and Basile, conspired to defraud the United States by knowingly making false

statements to prison and parole authorities that he was employed by Basile in order to gain his release from a Federal prison by first getting into a work release program at a halfway house and then by obtaining his parole.

No doubt aware that a successful prosecution against petitioner depended on the jury's acceptance of the testimony of Henry Hill, a career criminal of four decades, the Government, over defense counsel's vigorous objections, was permitted by the court to saturate the jury with a litany of prior heinous crimes comitted by Hill in conjunction with petitioner. The Government convinced the trial court that the evidence of the string of prior crimes was essential to

establish petitioner's motive in assuring Hill's release from prison so that the two men could once again resume their criminal activities. It was petitioner's position that even assuming that the evidence of prior crimes was relevant to demonstrate his motive to commit the crimes charged, any conceivable probative value this evidence might have had was substantially outweighed by the risk of unfair prejudice.

Following his conviction, petitioner in his brief to the United States Court of Appeals for the Second Circuit claimed that the trial court's refusal to exclude the evidence of the multiple prior crimes attributed to him so prejudiced the jury that he was denied his due process right to a fair

trial. Instead of weighing whether the wholesale admission into evidence of prior crimes violated rudimentary standards of fundamental fairness required by the due process clause of the Federal Constitution, the Second Circuit invoked the test consisting of whether the trial court acted arbitrarily or irrationally in admitting the prior crimes evidence against petitioner. It is submitted that this onerous standard of review applied by the Second Circuit is not compatible with the due process demands of the Federal Constitution.

In order the place the issue in its proper perspective, it is necessary to set forth the testimony of Henry Hill, the sole witness against petitioner.

HENRY HILL, 40 years old, testified that he has known petitioner Vario for approximately 25 years. (Hill: 179-180). He first started working for Vario in the late 1950's. (Hill: 181) It was also during this period that he became involved in all types of criminal activities such as robbery, larceny and gambling. Hill claimed that he was then working for petitioner. (Hill: 182) In 1959, he entered the United States Army and was court-martialed twice because he was absent without leave. While in the army, he continued to engage in criminal activities but was never apprehended for his crimes. (Hill: 182-184)

Upon leaving the Army in 1963, Hill returned to Brooklyn where he

again went to work for petitioner Vario performing different jobs. (Hill: 185) However, still enmeshed in criminal activities, Hill was convicted in 1965 of two separate crimes -- petty larceny and transporting untaxed cigarettes. During this particular period, he was also involved in other criminal activity with petitioner. (Hill: 185)*

Hill claimed that he was involved in robberies, hijackings, assaults, larceny, and gambling. In furtherance of his criminal pursuits, he became involved in 1967 in the Air France robbery at Kennedy Airport which

---

* When counsel objected to this line of testimony, the court overruled the objection and stated that the defense had a continuing objection. (185)

involved a cash theft of approximately one half million dollars. Following this robbery, Hill then entered into a business with petitioner. They operated a discotheque named Tempo Dance City which was located in the Canarsie Market of Brooklyn. (Hill: 186-187) In the mid to late 1960's petitioner introduced Hill to Philip Basile who owned a discotheque named Action House on Long Island. (Hill: 187-188)

In January of 1968, Hill again ran afoul of the law and was convicted of assault in Nassau County. Following his release from jail, he continued working for petitioner as his driver. During this period, Hill observed Basile and petitioner together. The two men would meet at Geffken's Bar in

Brooklyn, where petitioner conducted his business. (Hill: 188-190)

Hill next opened up a bar known as the Suite on Queens Boulevard in 1970. Petitioner was likewise involved in this business enterprise. (Hill: 190-191) In the meantime, Hill added to his list of crimes when he was convicted in 1972 of usury and assault in Nassau County. Hill claimed that petitioner posted the bail for him both then and in the sixties. (Hill: 191) Up to this point, Hill was still involved in such assorted crimes as robbery, hijacking, extortion and gambling. He also played a role in a murder as he was directed to bury a body. (Hill: 191-192)

When Hill left the Nassau County jail in the early 1970's, he continued

working for petitioner. (Hill: 192) However, he was convicted of extortion in the Federal court in Tampa, Florida, in 1974 and was sentenced to a ten year prison term. Even when incarcerated at Lewisburg Federal Penitentiary, Hill continued to maintain a relationship with petitioner who would send him money. (Hill: 193-194) Imprisonment did not deter his criminal activities. Hill continued to commit crimes for which he was never charged. He dealt in contraband and repeatedly resorted to bribing prison guards in order to receive certain favors. (Hill: 194)

In August of 1977, Hill was transferred from Lewisburg to Allenwood and still maintained his contact with petitioner. (Hill: 194) In October of 1977, Hill applied for parole. He had

told his caseworker, Mr. Garbo, that he had a definite offer of employment at a restaurant on Long Island. He conveyed this information hoping to obtain a favorable decision from the parole board. He also made the false statement on his parole application that he would have a position as an assistant manager at a restaurant should he be granted parole. (Hill: 194-197) When asked if he had any conversation with petitioner before making these representations to the Parole Board, Hill responded that at the end of 1976, he told a petitioner that he needed a job so that his parole application would be considered favorably. When he mentioned Speaks or Philly (Basile) out on Long Island, petitioner said he would speak to him

and not worry about it. (Hill: 197) Petitioner later told Hill that he had taken care of it and that he would make Basile put him on the books. (Hill: 198-200)

After his parole application was granted on the national level, Hill again spoke with petitioner and told him that he now needed a job for the halfway house. Petitioner said that he would straighten it out with Basile. Subsequently, petitioner told him that he would make Basile put him on the books, meaning that it would be a no-show or dummy job. (Hill: 198-200)

Following the notification that his parole date would be effective on October 8, 1978, Hill applied for a transfer to a halfway house. (Hill: 203, Gov. Ex. 17) He did not check the

job placement assistance on the application because he already had a job. (Hill: 203-204) However, he did check off the work release part of the form.

While still at Allenwood, Hill obtained a furlough to go with other inmates to Atlantic City for a Jaycee convention. He clandestinely left Atlantic City and traveled to Brooklyn where he met petitioner at Geffkens'. When he asked petitioner if he had spoken to Basile, petitioner responded that he had and that everything was okay. (Hill: 204-205)

On July 12, 1978, Hill was sent to the Community Treatment Center in New York City where he was advised of the rules and regulations of the center. (Hill: 206) Although he was told that

he could not leave the jurisdiction of New York or Long Island, he flew to Pittsburgh to pick up some narcotics to sell on Long Island. (Hill: 208, 229; A. 59, 80) He also met with a basketball player from Boston College to discuss point shaving. (Hill: 208)

When Hill filled out the job information form (Gov. Ex. 20) for the halfway house, he set forth Breakout Management Corp. as his employer and Philip Basile as his immediate supervisor. Other than obtaining pay stubs from Basile, Hill maintained that he never did any work for him. (Hill: 210-213) Since the people at the halfway house were informed that he held this job, he was granted additional privileges such as permission to spend weekends away from

the center. (Hill: 212)

Hill admitted that even while he was at the halfway house, he continued to commit crimes such as selling narcotics, selling guns, and planning to fix basketball games. (Hill: 214) He also continued to work for petitioner while at the halfway house and after his parole on October 6, 1978. He sold drugs and committed other crimes. (Hill: 214-215) However, he was not involved in drug dealing with petitioner despite the fact that he told the F.B.I. that petitioner had been dealing in drugs. Petitioner had even asked him to stop selling drugs when Hill told him that he was engaging in this activity. (Hill: 249-250)

In the spring of 1980, Hill was

arrested on multiple narcotic charges in Nassau County. Hill was now confronted with seven different indictments and was aware that he was facing a fifteen year to life penalty on each count. He had been selling drugs in various communities on Long Island, Queens, Pennsylvania, California, and Florida. (Hill: 216, 232-233)

After the charges had been lodged against him, Hill began cooperating with the Federal Government. As a result of his cooperation, he received immunity and the Nassau County drug case was dismissed. (Hill: 220) Hill did not initially tell the government that petitioner had arranged for him to obtain a job at Breakout Management. (Hill: 264) He relayed this

information possibly a year and a half to three years later. (Hill: 265) When subsequently questioned by the Government as to why he did not immediately tell the Federal authorities about his activities with Vario, Hill responded that he was afraid of him. (Hill: 299) He had also been informed by the F.B.I. that a contract had been placed on his life. (Hill: 216, 220)

Over objection, Hill was permitted to testify on redirect that he did not ask Basile for a dummy job at the Breakout Management because he did not want Basile to refuse him. He asked petitioner since Basile could not refuse him. Hill explained that in the late 1960's petitioner directed him and a group of people to go to one of

Basile's clubs and break it up. Basile then began making regular payments of money to petitioner. During the period from 1968-1969, Hill, pursuant to petitioner's directive, went to Basile's club where he was given $15,000 by Basile to give to petitioner. In 1979 or 1980, Hill also observed Basile give petitioner $10,000. (Hill: 297-298)*

---

*It cannot be argued that the jury did not connect petitioner to the proliferation of crimes admitted to by Hill. The Government clearly dispelled any such doubts in its rebuttal summation when the jury was informed:

> "How about the other crimes, the robbery, the hijacking, the loan sharking, the gambling, the extortion, the wrecking of the club? Mr. Vario wants Mr. Hill out of jail. He wanted him out on the street to do his bidding and there is your corroboration, ladies and gentlemen. He was succesful. He got him out. Mr.

REASONS FOR GRANTING THE WRIT

As a general proposition, when the government seeks to introduce evidence of uncharged crimes against a defendant, the prosecution is required to satisfy a two-pronged test. First, the proferred evidence must be relevant to some disputed issue in the trial [Fed. R. Evid. 404(b)], and second its probative value must not be substantially outweighed by the risk of unfair prejudice. [Fed. R. Evid. 403] However, in its review of cases raising

---

Hill was out for thankfully, a short period of time before he finally was apprehended."(398)

The Government had already previously told the jury, "The evidence was the Henry Hill and Paul Vario had a relationship for over twenty years; that Paul Vario was Henry Hill's boss; that Henry Hill had committed crimes at the direction of Paul Vario; that Paul Vario was involved in businesses with Henry Hill."(354)

this precise issue, the Second Circuit has steadfastly declined to assess the prejudicial impact of such evidence on a defendant's due process right to a fair trial as mandated by Fed. R. Evid. 403, but has limited its review of such issues to a summary determination of whether the trial court acted "arbitrarily or irrationally" in admitting the prior crimes into evidence. United States v. Robinson, 560 F.2d 507, 515 (2d Cir. 1977); United States v. Birney, 686 F.2d 102, 106 (2d Cir. 1982).

It is submitted that the Second Circuit's use of the standard of arbitrariness and irrationality in reviewing the prejudicial effects of prior crimes evidence is at direct odds with the due process demands of the

Fifth Amendment of the Federal Constitution and the Federal Rules of Evidence 403. The present case squarely poses the issue concerning whether the stringent test of arbitrariness and irrationality is consistent with the due process demands of fundamental fairness.

In this case, the Government convinced the trial court that the evidence of the string of prior crimes was essential to establish petitioner's motive in assuring Hill's release from prison so that the two men could once again resume their criminal activities. Hence, over strenuous objection by the defense, Hill was permitted to relate a twenty five year prolonged history of outrageous criminal conduct that clearly implicated petitioner. The

crimes admitted by Hill when working for petitioner ran the gambit from robberies, larcenies, arsons, hijacking, loansharking, extortion, the Kennedy Airport theft, the Boston College pointshaving scheme, to even murder, when Hill was directed to bury a body. There can be no question but that the jury understood that petitioner was the mastermind behind these heinous crimes especially since the Government stressed petitioner's role in these nefarious crimes in its rebuttal summation.

Given these circumstances, petitioner maintained in the Court of Appeals that this chain of evidence had to have an adverse and prejudicial impact upon the jury. It was petitioner's position that once exposed

to evidence revealing that he was guilty of a multitude of crimes, the jury had to be convinced that petitioner was in fact an evil man and thus deserved to be convicted of the crimes charged irrespective of the quality of the Government's proof. According to petitioner, this inflammatory evidence so contaminated the jury's verdict that a fair trial was thereby rendered impossible.

Instead of assessing the prejudicial impact of the prior crime evidence on petitioner's due process right to a fair trial or whether the admission of such evidence violated the fairness requirement under Fed. R. Evid. 403, the Second Circuit in effect circumvented the due process issue. Once the Court of Appeals made the

determination that the prior crimes evidence was relevant to the issue of motive under Fed. R. Evid. 404 (b), the Court by relying on its prior decision of United States v. Birney, supra, focused solely on whether the trial court in admitting this evidence acted arbitrarily or irrationally. In applying such a rule for the first time in United States v. Robinson, supra, the Second Circuit stated ". . . we are persuaded the preferable rule is to uphold the trial judge's exercise of discretion unless he acts arbitrarily or irrationally." United States v. Robinson, 560 F.2d at 515. See also United States v. Birney, 686 at 106.

It is submitted that this harsh test of arbitrariness and irrationality

is totally incompatible with the dictates of the due process clause of the Federal Constitution. In other words, by imposing this standard, the Second Circuit is in effect ruling that no due process violation can be found premised on the admission of prior criminal acts unless the trial court acted in an irrational manner. Such a ruling dilutes the due process requirement of a fair trial. Under the standards applied by the Second Circuit, the erroneous admission of such evidence would not be reviewable absent a showing of arbitrariness or irrationality on the part of the trial court. While the trial court in admitting such evidence may not have acted irrationally or even arbitrarily, the evidence nonetheless may still be

so prejudicial that the defendant could not receive a fair trial.

Here, even assuming that the evidence of prior crimes was admissible to establish the issue of petitioner's motive, Fed. R. Evid. 403 still mandates that an assessment must then be made to determine whether its probative value is substantially outweighed by the risk of unfair prejudice. The Second Circuit, while finding that the prior crimes evidence was relevant to establish petitioner's motive, relinquished its obligation to review the prejudicial effects of such evidence as mandated by Fed. R. Evid. 403.

In this context, it is critical to note that no other Circuit uses the test of irrationality or arbitrariness

in determining the prejudicial effects of such evidence. Not only is such a standard impossible to establish but also it is in direct conflict with the due process requirement of according a fair trial to the defendant. Because the evidence of prior crimes was overwhelming in this case, this case presents the perfect vehicle for this Court to review whether the test of irrationality and arbitrariness is compatible with the due process clause of the Fifth Amendment and with Fed. R. Evid. 403.

Accordingly, we urge that this Court grant petitioner's application for a writ of certiorari in order to resolve this important issue.

CONCLUSION

FOR THESE REASONS, A WRIT OF CERTIORARI SHOULD BE ISSUED TO REVIEW THE JUDGMENT AND OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

JOEL WINOGRAD
Attorney for Petitioner
950 Third Avenue
New York, New York 10222

JULIA PAMEL HEIT
Of Counsel

Appendix A
Opinion
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of August , One Thousand Nine Hundred and Eighty-four,

PRESENT:
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge
HON. RALPH K. WINTER, Circuit Judge
HON. ALBERT W. COFFRIN, Chief District Judge

----------x

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL VARIO,

Defendant-Appellant.

----------x-

Paul Vario appeals from a judgment of conviction of the United States District Court for the Eastern District

of New York (McLaughlin, J.) which followed a jury's finding that appellant was guilty of conspiring to make false statements to the United States and to defraud the Government, in violation of U.S.C. 371, and making false statements to the United States, in violation of 18 U.S.C. §1001. Appellant's sole contention is that the district court erred in permitting the Government to introduce evidence of prior crimes which he is alleged to have committed in conjunction with the Government's principal witness, Henry Hill. This contention is without merit.

Evidence concerning Vario's criminal association with Hill was relevant to establishing motive which

is a permissible use of other crimes evidence under Fed. R. Evid. 404(b). See United States v. Birney, 686 F.2d 102, 106 (2d Cir. 1982); United States v. Buffalino, 683 F.2d 639, 647 (2d Cir. 1982), cert. denied, 103 S.Ct. 727 (1983). Because there was no abuse of discretion by the district court, its determination that the probative value of Hill's testimony outweighed its prejudicial effect requires affirmance. See United States v. Birney, supra, 686 F.2d at 106. Appellant may not be heard to complain about his counsel's tactical decision to refuse the district court's offer of a limiting instruction regarding the appropriate use of the other crimes evidence. See United States v. Levy, 578 F.2d 896, 900 (2d Cir.1978).

Affirmed.

N.B. Since this statement doe snot constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Hon. Ellsworth A. Van Graafeiland

Hon. Ralph K. Winter

Hon. Albert W. Coffrin